U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12796067

Date: DEC. 31, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, an actor, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that although the record established that the Petitioner satisfied the initial evidentiary requirements for this classification, he did not establish, as required, that he has sustained national or international acclaim and that he is among that small percentage at the very top of his field. The matter is now before us on appeal.

Upon *de novo* review we will withdraw the Director's decision and remand the matter for the entry of a new decision consistent with the following analysis.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability if:

> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation

at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner is an actor who works in the film, theatre and television industry in Bangladesh.

Because the Petitioner has not established that he has received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director found that the Petitioner met three of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). Specifically, the Director determined, and the record supports, that the Petitioner has received nationally recognized awards, that he and his work were featured in published materials in major media, and that he authored a scholarly article in a professional publication. *See* 8 C.F.R. § 204.5(h)(3)(i), (iii) and (vi). The Director determined that the Petitioner claimed, but did not meet, the criterion related to display of his work at artistic exhibitions or showcases under 8 C.F.R. § 204.5(h)(3)(vii).

Because the Petitioner met three of the regulatory criteria, the Director proceeded to a final merits determination. In a final merits determination, the Director must analyze all of a petitioner's accomplishments and weigh the totality of the evidence to determine if their successes are sufficient to demonstrate that they have extraordinary ability in the field of endeavor. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2), (3); *see also Kazarian*, 596 F.3d at 1119-20.[1]

On appeal, the Petitioner argues that the Director's decision reflects that he did not consider all the evidence together in its totality in determining whether the Petitioner is eligible for the benefit sought. We agree with that assertion as the final merits determination section of the decision contains few references to the submitted evidence. For example, although the Director determined that the Petitioner satisfied both the awards and published materials criteria at 8 C.F.R. § 204.5(h)(3)(i) and (iii), the Director did not mention or weigh the evidence related to his awards and media coverage in

[1] *See also* USCIS Policy Memorandum PM 602-0005.1, Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14 4 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

the final merits discussion. In fact, the only evidence specifically referenced in the final merits determination is the Petitioner's co-authored scholarly article submitted under 8 C.F.R. § 204.5(h)(3)(vi). The Director's decision rests primarily on a conclusion that the Petitioner had not show that "authorship of one scholarly article is reflective of [his] being among the small percentage at the very top of the field."

In addition, the Petitioner asserts that the Director provided a confusing and self-contradictory analysis of the display criterion at 8 C.F.R. § 204.5(h)(3)(vii) and maintains that he submitted sufficient evidence to establish that he meets this criterion. Specifically, the Petitioner claimed eligibility based on the screening of his film [redacted] at [redacted] Film Festival and based on his live theatrical performances at the [redacted] Festival in Bangladesh.

The Director found that the evidence submitted in support of this criterion did not meet its requirements for two reasons: first, the Petitioner's work did not fall into the "visual arts" such as painting, sculpting and photography; and second, that the Petitioner failed to demonstrate that "the exhibition or showcase is itself of distinction." The Director noted that "displaying work at festivals is not a uniquely extraordinary accomplishment or associated with those at the apex of the industry." However, as the Petitioner states on appeal, neither of these requirements appear in this regulatory criterion. USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *See Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008).

The purpose of a film or theatre festival is typically to showcase or exhibit films or plays as artistic works. Accordingly, the Director should re-evaluate the evidence submitted to determine whether the Petitioner has satisfied the plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(vii). A determination as to whether the evidence submitted under this criterion supports the Petitioner's extraordinary ability claim should be made in the final merits determination.

Finally, in addition to not weighing the evidence submitted in support of the nationally-recognized awards, published materials and display criteria, the Director's final merits discussion disregarded evidence that the Petitioner had submitted in support of his petition. Such evidence included, in part, multiple reference letters, evidence that the Petitioner served as the [redacted] of the actors' union in Bangladesh, and evidence of other awards and honors he received during his lengthy career. Because the Director did not consider any of this evidence in the final merits analysis, the decision does not sufficiently address why the Petitioner has not demonstrated that that he is an individual of extraordinary ability under section 203(b)(1)(A) of the Act.

An officer must fully explain the reasons for denying a visa petition in order to allow a petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

Accordingly, we will withdraw the Director's decision and remand the matter for further review and entry of a new decision. As the Director already determined that the Petitioner satisfied at least three criteria, the new decision should include an analysis of the totality of the record evaluating whether

the Petitioner has demonstrated, by a preponderance of the evidence, his sustained national or international acclaim and whether the record demonstrates that he is one of the small percentage at the very top of the field of endeavor, and that his achievements have been recognized in the field through extensive documentation. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2), (3); *see also Kazarian*, 596 F.3d at 1119-20.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.